In the High Court of Punjab and Haryana at Chandigarh

CUSAP No. 8 of 2007

Date of Decision: 23.08.2007

Commissioner of Customs, Amritsar

…Appellant

Versus

M/s ATM International, Jalandhar and others

…Respondents

CORAM: HON'BLE MR. JUSTICE M.M. KUMAR

HON'BLE MR. JUSTICE AJAY KUMAR MITTAL

Present: Mr. Kamal Sehgal, Advocate,
for the Appellant.

Mr. Jagmohan Bansal, Advocate,
for the Respondents.

JUDGMENT

M.M. KUMAR, J.

This is a custom appeal preferred by the revenue under Section 130 of the Customs Act, 1962 (for brevity, 'the Act'), challenging final order No. 1379-1398/06-SM(BR), dated 13.9.2006 (Annexure A-6), passed by the Custom, Excise and Service Tax Appellate Tribunal, Principal Bench, New Delhi (for brevity, 'the Tribunal). The Tribunal has primarily based its opinion for accepting

the view of the Commissioner (Appeals) expressed in his order dated 31.1.2006 (Annexure A-5) by holding that the penalty under Section 112 of the Act could be imposed either on importer or any person who abets the importer in doing any act or omission which renders the goods liable to confiscation etc. It has also been held that the penalty imposed under Section 112 of the Act was not legally sustainable because in the show cause notice specific clauses (a) or (b) were not invoked against the assessee-respondent. The revenue has claimed that the following substantial question of law would emerge for determination of this Court:-

> "Whether in the facts and circumstances of the case, assessee-respondents are liable for penal action under Section 112 (b) of the Customs Act, 1962, on account of fraudulent availment of Duty Entitlement Pass Book (DEPB) benefit on the basis of forged Bank Certificate of Export and Realisation (BCER)?"

Brief facts of the case may first be noticed. The assessee M/s ATM International is a partnership concern and they are engaged in the export of various items. On the basis of intelligence reports, Anti-Smuggling Unit of Customs Commissionerate, Amritsar, initiated investigation against the assessee-respondents, who were alleged to be involved in fraudulent availment of credit on the export of goods under Duty Entitlement Pass Book Scheme (DEPB) by forging documents. A show cause notice after investigation was issued on 3.5.2002 to the assessee-respondent No. 1 and its partners (assessee-respondent Nos. 2, 3, 4 and 5), which was answerable to the

Commissioner of Customs, Amritsar. The allegation in the show cause notice revealed that after perusal of record pertaining to exports under DEPB (which included shipping bills, bank certificate of export and realisation, application for DEPB in possession of the Director General of Foreign Trade, Ludhiana, the record of the Oriental Bank of Commerce, Overseas Branch, Jalandhar, etc.) it was found that in respect of 10 shipping bills, bank realisation certificates were not issued by the bank which were forged by the assessee-respondent 2, who is a partner in the firm assessee-respondent No. 1 to obtain DEPB credits fraudulently. On the strength of forged bank realisation certificate purported to have been issued by the Oriental Bank of Commerce, Overseas Branch, Jalandhar and the Director General of Foreign Trade, Ludhiana, the details of 10 shipping bills were given as under:-

No	Shipping Bill No.	Date	DEPB No	DATE	FOB value export	DEPB availed
1	002900	3.9.99	3010001332	17.12.99	1706481/-	290101/-
2	004410	27.11.99	3010002171	31.10.00	1687851/-	286934/-
3	001566	14.06.99	3010000337	4.10.99	1338723/-	227582/-
4	004739	17.12.99	3010002059	21.1.00	2046806/-	347957/-
5	004687	14.12.99	3010002059	21.1.00		
6	004222	16.11.99	3010002060	21.1.00	1540943/-	261960/-
7	007248	7.8.2000	3010005599	6.9.01	1753530/-	298099/-
8	004040	4.11.99	3010002060	21.1.00	1542945/-	262299/-
9	006728	25.7.2000	3010005599	6.9.01	1762871/-	299688/-
10	000033	3.1.2000	3010005598	6.9.00	2631729/-	447393/-
		TOTAL			16011879/-	2722013/-

It was further alleged that on the basis of the fraudulently obtained DEPB credits to the tune of Rs. 27,22,013/- and the DEPB Scrips, obtained fraudulently were registered with customs at CFS (OWPL), Ludhiana. Those Scrips were transferred to various buyers

for consideration. They tendered their respective statements and also filed reply to the show cause notice before the Adjudicating Authority. After affording a detailed opportunity of hearing, the Adjudicating Authority recorded the following findings:-

> "24. On investigation, it has been proved beyond any doubt that DEPB scrips were got issued by Noticee No. 2 on the basis of fake BRCs, which have been cancelled ab-initio by the licensing authority. In this connection I find that similar issue came up for consideration before the Hon'ble Tribunal in the case of ICI India Ltd. Vs. Commissioner of Customs, Calcutta cited as 2003 (151)ELT 336 (Tri). The Hon'ble CEGAT after consideration observed that "Fake documents ab-initio unlawful". It was also held "no benefit could accrue to their holder and no credit of duty could be taken on them, denial of benefit of Notification No. 34/97-Cus dated 7.4.1997 upheld". The Tribunal also held that fake document is ab-initio unlawful and void. Any amount of official action upon such a document cannot sanctify it or otherwise make it lawful. Such a document cannot give rise to any right or benefit in law. This is a legal position settled by the Hon'ble Supreme Court in New India Assurance Co. Vs. Kamla and others 2001 (4)

SCC 342. The Tribunal also observed that in the Show Cause Notice proposal was to confiscate the imported goods under section 111(O) of the Act and demand of duty under Section 28(I) of the Act. The Tribunal disposed of the appeal by the confirmation of the duty demand alongwith interest under Section 28AB of the Act and affirmed the order of confiscation of goods under Section 111(O) of the Act, observing that since the DEPB licenses null and void ab-initio, no credit of duty was available to the appellant against those scrips and the paramount condition under Notification was not fulfilled by the Importer and held the appellant liable to pay duty. The Hon'ble High Court (Calcutta) in the case of ICI India Ltd. Vs. Commissioner of Customs (Port) Calcutta (2005(184) ELT 339 (Cal.)) has held that credit available on the strength of a valid DEPB only and if the same is forged, is nonest, therefore, there is no valid DEPB – No credit of duty can be derived thereunder."

With regard to period of limitation, the Adjudicating Authority held as under:-

"25. As regard the contention that extended limitation is not applicable I find that as per Section 28(1) of the Act, extended period is invokable where

> Noticee No. 2 willfully mis-stated, suppressed the facts and committed fraud. In the present case, the DEPB scrip was got issued by Noticee No. 2 on the basis of forged BRCs to obtain DEPB benefit. Thus, all the benefit availed in lieu of the DEPB scrip which were obtained by fraudulent means either by the importer or exporter or the party who purchased the DEPB scrip and imported the goods after availing the exemption in lieu of said scrips, are not admissible to them and the duty so foregone is recoverable from importer (Noticee No. 1) by invoking extended period of limitation. I thus hold that duty amounting to Rs. 1,84,189/- (RS. One lac eighty four thousand one hundred eighty nine only) is recoverable from the Noticee No. 1 under Section 28(1) of the act alongwith interest under Section 28AB of the Act ibid."

The Adjudicating Authority placing reliance on Section 112 of the Act has referred to the admissions made by the assessee-respondent No. 2 Shri Ashok Kumar and others and held as under:-

> "27. I find that Sh. Ashok Kumar @ Lucky (Noticee No. 3) was looking after all the business operations of the Noticee No. 2 including exports and foreign exchange. During investigations he admitted that the Bank certificates of Exports &

Realization had been signed by him and that these were forged. He also felt sorry for the act of forgery resulting in defrauding the Govt. on the basis of documents signed by him. He admitted that the applications for DEPB's in respect of Shipping Bill No. 2900 dated 3.9.1999, 156 dated 14.6.1999, 4040 dated 21.12.1999 and 4222 dated 16.11.1999 were signed by him. I further observe that another partner of the firm Sh. Mukesh Kumar (Noticee No. 5) also participated in the commissioning of the fraud by way of signing the applications for DEPB's in respect of Shipping Bill No. 33 dated 30.1.2000, 6728 dated 25.7.2000, 7248 dated 7.8.2000, 4739 dated 17.12.1999, 4687 dated 14.12.1999 and 4410 dated 27.11.1999 in the absence of Noticee No. 3. So both the Noticee No. 3 and 5 have actively connived with the firm in the commissioning of the fraud.

28. I also observe that as per records Sh. Tara Singh (Noticee no. 4) was looking after raw material and production of the firm. He was also looking after purchase of raw material and making arrangement of labour. I further observe that Sh. Yogesh Kumar (Noticee No. 6) was a partner of the firm.

He was running a shop in the name and style of M/s LOOKS, Jalandhar. The Noticee No. 4 and 6 were party to profit/loss incurred to the firm and are accountable for the affairs of the firm their involvement in/knowledge of commissioning the fraud cannot be ruled out. Thus, they are liable to penal action under Section 112 of the act.

29. In view of the above discussion, I observe that the goods imported by the Noticee No. 1 are liable to confiscation and customs duty amounting to Rs.1,51,961/- is also recoverable from them under Section 28 of the act alongwith interest. I further observe that Noticee No. 2 to 6 are also liable to penal action under section 112 of the Customs Act, 1962."

It went on to confirm the demand of Rs. 1,51,961/- against the assessee respondent No. 1, and confiscation of the goods valued at Rs. 14,61,836/- imported vide bill of entry No. 000557, dated 3.12.2000. But since the goods were not available, no orders of confiscation were passed. A penalty of Rs. 1,80,000/- was imposed on the assessee respondent No. 2 under Section 112 of the Act and Rs. 45,000/- on assessee respondent No. 3, Rs. 10,000/- each on assessee respondent Nos. 4, 5 and 6.

On appeal filed before the Commissioner (Appeals), the Commissioner (Appeals) accepted the contention of the assessee-respondents that penalty under Section 112 of the Act could be

imposed either on importer or any person who abets the importer in doing an act or omission etc. He further found that the assessee-respondents were neither importer of the goods nor has been wrongly entangled with the exporters. The penalty was deleted on the further ground that in the show cause notice specific violation of clause (a) or (b) of Section 112 of the Act were not alleged. In that regard, the Commissioner (Appeals) has placed reliance on a judgment of the Madras High Court in the case of **B. Lakshmichand v. Government of India, 1983 (12) E.L.T. 322 (Mad.)**. The aforementioned view of the Commissioner (Appeals) has been accepted by the Tribunal and the appeals of the revenue have been rejected.

Mr. Kamal Sehgal, learned counsel for the revenue has primarily argued that the assessee-respondents have placed reliance on a judgment of the Tribunal in the case of M/s Parker Industries and the order passed by the Tribunal in the aforementioned case was reversed by a Division Bench of this Court in the case of The Commissioner of Customs, Commissionerate, Amritsar v. M/s Parker Industries, Jalandhar (Custom Act Appeal No. 1 of 2006, decided on 7.11.2006), deciding the issue of penalty in favour of the revenue. According to the learned counsel once the assessee-respondents have been found to have indulged in forgery and other activities then the penalty proceedings are necessary consequence. The penalty proceedings could be validly initiated and penalty was rightly imposed by the Adjudicating Authority. He has further submitted that merely because reference to sub-sections of Section 112 of the Act

was not made in the show cause notice, would not be suffice to declare the penalties as illegal unless the assessee-respondents are able to show that they had suffered a prejudice by omission to mention the sub-sections because rules of natural justice are not mechanical in their application. Learned counsel has maintained that the assessee-respondents have been granted detailed hearing. They have filed reply to the show cause notice, then the opportunity to file written arguments and personal hearing were granted. If principles of natural justice by granting numerous opportunities have been followed then mere omission to mention sub-sections of Section 112 of the Act could not result into declaring the impugned order as illegal in the absence of any prejudice having been suffered by the assessee-respondents.

Mr. Jagmohan Bansal, learned counsel for the assessee-respondents has argued that in the absence of any specific allegation, the penalties are unsustainable, as has been rightly observed by the Tribunal. In that regard he has placed reliance on a judgment of Hon'ble the Supreme Court in the case of **Amrit Foods v. Commissioner of Central Excise, U.P., 2005 (190) E.L.T. 433 (S.C.)**. He has further submitted that there was no question of forgery because the foreign exchange remittance were duly received by the bank. He has argued that licence have never been cancelled and they continued to be valid and in that regard he placed reliance on para 22 of the Division bench judgment of the Bombay High Court in the case of **Commissioner of Customs (E.P.) v. Jupiter Exports, 2007 (213)**

E.L.T. 641 (Bom.). With regard to the order passed by the Tribunal in M/s Parker Industries' case (supra), learned counsel has submitted that nothing will turn on the aforementioned contention raised by the revenue because the order was merely relied on but it was never accepted by the Tribunal and, therefore, the argument that principle in the nature of estoppel would apply, would not be acceptable. Therefore, reversal of order in Parker's case (supra) would not affect the rights of the assessee-respondents to make submission independently.

Having heard learned counsel at a considerable length and after examining the order passed by the Adjudicating Authority, Appellate Authority as well as the Tribunal, we have reached the conclusion that this petition deserves to be allowed. The Adjudicating Authority in para 24 of its Order-in-Original has recorded categorical findings of fraud concluding that it was proved beyond any doubt that DEPB Scrips were obtained by respondent No. 2 Ashok Kumar on the basis of a fake Bank Certificate of Export and Realisation and the same were cancelled ab-initio by the licensing authority. It has also placed reliance on an admission made by respondent No. 2 in para 27 of its order (supra) admitting that the Bank Certificate of Export and Realisation were signed by him and that those were forged. Once the finding of fraud and forgery have come on record then the order of the Adjudicating Authority cannot be set aside either by the Appellate Authority or the Tribunal on technical grounds that under Section 112 of the Act, penalty could have been imposed only on the importer or any person who abets the

importer. One principle which has been established beyond any doubt is that fraud vitiates all acts. Hon'ble the Supreme Court in the case of **S.P. Chengalvaraya Naidu v. Jagannath, (1994) 1 SCC 1**, in that regard has observed as under:-

> " "Fraud avoids all judicial acts, ecclesiastical or temporal" observed Chief Justice Edward Coke of England about three centuries ago. It is the settled proposition of law that a judgment or decree obtained by playing fraud on the court is a nullity and non est in the eyes of law. Such a judgment/decree – by the first court or by the highest court – has to be treated as a nullity by every court, whether superior or inferior. It can be challenged in any court even in collateral proceedings."

The aforementioned view has been followed in the case of **Hamza Haji v. State of Kerala, (2006) 7 SCC 416**. We are further of the view that the findings recorded by the Adjudicating Authority are well founded because in addition to other evidence on record, respondent No. 2 himself has admitted commission of forgery for having signed the Bank Certificate of Export and Realisation. Under Sections 17, 18 and 19 of the Evidence Act, 1872, self harming statements are broadly considered to be admission and are regarded as best piece of evidence. Such an admission supported by other evidence cannot be ignored on mere technical ground that show cause notice did not specifically mention clauses (a) or (b) of Section 112 of the Act, especially when no prejudice is shown to have suffered by

the assessee-respondents. We feel unable to agree with the view taken by the Tribunal that the department in show cause notice issued to the respondents, was required to specify whether respondents were proceeded against under clause (a) or (b) of Section 112 of the Act. The principles of natural justice are not mere formalities required to be performed by the authorities. After issuance of show cause notice a detailed reply was filed and then opportunity of hearing was also afforded to the respondents. It has nowhere been explained as to how interests of the assessee-respondents were adversely affected by non-specification of clauses (a) or (b) of Section 112 of the Act. It cannot be laid down as a rule of law that in cases where said clauses of Section 112 of the Act have not been specified then in all cases such show cause notice is liable to be quashed and the orders passed thereafter are liable to be set aside. We are unable to read anything of that nature in the judgment of Hon'ble the Supreme Court in the case of Amrit Foods (supra) on which reliance has been placed by the learned counsel for the assessee-respondents. We are also of the view that the judgment in M/s Parker Industries passed by a Division Bench of this Court (supra) has reversed the view taken by the Tribunal upholding the submission made by the revenue. The assessee-respondents have placed reliance on the judgment of the Tribunal when the matter was argued before the Appellate Authority and the Tribunal. Therefore, for the aforementioned additional reason, the view taken by the Tribunal and the Appellate Authority is unsustainable and, thus, liable to be set aside. It is also evident that

the Adjudicating Authority ordered confiscation of goods imported by Bill of Entry dated 3.12.2000, under Section 111(O) of the Act. However, since the goods were not available, no order of confiscation thereof could be passed. It cannot be said that Section 112 of the Act would not be attracted because obtaining the DEPB would have to be considered an act, which would render any goods liable for confiscation under Section 111(O) of the Act. Therefore, we do not find any substance in the argument that Section 112 of the Act is not applicable.

For the reasons aforementioned, the question framed in the first para of this judgment is answered in the affirmative and accordingly the appeal is allowed. The view taken by the Appellate Authority and the Tribunal is set aside and that of the Adjudicating Authority is restored.

(M.M. KUMAR)
JUDGE

(AJAY KUMAR MITTAL)
JUDGE

August 23, 2007

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